



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 576 OF 2017

(Formerly Nairobi ELC Case No. 1091 of 2015)

LUCY WAIRIMU NJOGU.....PLAINTIFF

VERSUS

AMOS MACHARIA.....DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion dated the 8th May, 2019 brought pursuant to Order 2 Rule 15 (a), (b), (c) and (d); Order 51 Rules 1 and 2 of Civil Procedure Rules as well as section 3A of the Civil Procedure Act. The Plaintiff seeks for orders that the Defendant's Defence and Counterclaim should be struck off. It is premised on the grounds on the face of the application and the supporting affidavit of LUCY WAIRIMU NJOGI where she deposes that the Defence has nothing other than a denial of the Plaintiff's ownership of the suit land. She avers that the Defendant's Defence is hopeless as he has failed to attach documents to demonstrate his proprietary rights over the suit land. The Defence violates the rules of procedure as no witness statement and supporting documents have been filed alongside it. She contends that the Counterclaim is a nullity and not signed nor dated by a party or his advocate. She explains that the Counterclaim does not bear a court stamp and hence it is not filed and does not exist in court records. He avers that Moses 'Kirruti's case No. 579 of 2017 is bound to fail completely as he is the one who subdivided land parcel number Kajiado/ Kitengela/ 1957 through Nairobi High Court Case No. 4861 of 1989.

The Defendant opposed the application and filed a Notice of Preliminary Objection dated the 2nd July, 2019 and a replying affidavit sworn on 15th November, 2019 where he deposes that his statement of defence raises triable issues as he has contested the Plaintiff's ownership rights over the suit land. He confirms that he filed a List of Witnesses, Witness Statement and Verifying affidavit in full compliance to dictates of procedure. He insists his pleadings are signed, dated and received by the Stamp of the Honourable Court stamp. He reiterates that his failure to comply with pre trial directions are as a result of the Plaintiff's failure to prosecute the matter for more than 2 years.

The Plaintiff and the Defendant filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Plaintiff's Notice of Motion dated the 8th May, 2019 including the parties' affidavits and submissions, the only issue for determination is whether the Defendant's statement of Defence including the counterclaim should be struck out.

The Plaintiff submitted that the Defence including the counterclaim does not raise a triable issue and should hence be struck out. She contended that the Defendant has raised issues already dealt with in ELC 579 of 2017 in his Defence. She relied on the decisions of **Kivanga Estate Limited V National Bank of Kenya Limited (2017) eKLR** and **Continental Butchery Limited V Samson Musila Nthiwa Civil Appeal No. 35 of 1977** to buttress her arguments. The Defendant in his submissions reiterated that his Defence and Counterclaim raise triable issues. He contended that the instant application should not be treated as unopposed and sought for leave for his replying affidavit filed out of time to be allowed. He relied on following decisions: **Civil Application No. 26 of 2018 Gideon Sitelu Konchellah V Julius Lekakeny Ole Sunkuli & 2 Others; Raila Amolo Odinga & Another V Independent Election & Boundaries Commission Petition No. 1 of 2017 and Central Bank of Kenya V Uhuru Highway Development Ltd & Others Civil Appeal No. 75 of 1998** to support his averments. He insisted that his pleadings are complete and the Defence raises triable issues as he has contested the ownership of the Plaintiff's right to the suit land. He relied on the following decisions of **the Cooperative Merchant Bank Ltd V George Fredrick Wekesa Civil Appeal No. 54 of 1999; Delphis Bank Limited V Caneland Limited (2014) eKLR; Civil Appeal No. 12 of 2018 UAP Insurance V Lameck Bororio Mwene; Job Kiloch V Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio (2015) eKLR; and Desbro (Kenya) Ltd V Polypipes Limited & Trident Insurance Co. Ltd (2018) eKLR** to buttress his arguments.

Order 2 rule 15 of the Civil Procedure Rules provides as follows: **'(1) At any stage of the proceedings the court may order to be struck**

out or amended any pleading on the ground that— (a) it discloses no reasonable cause of action or defence in law; or (b) it is scandalous, frivolous or vexatious; or (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.’

In the Court of Appeal in the case of **RAMJI MEGJI GUDKA LTD –Vs- ALFRED MORFAT OMUNDI MICHIRA & 2 OTHERS** [2005] eKLR held as follows:

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said:-

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham.”

The Defendant had sought for leave for his replying affidavit filed out of time to be deemed to have been duly filed. I note the Defendant had initially filed a Notice of Preliminary Objection to oppose the instant application. The Plaintiff claims the application should be deemed to be unopposed. In placing reliance on Order 51 Rule 14 of the Civil Procedure Rules, which is not couched on mandatory terms as well as the decisions of **Civil Application No. 26 of 2018 Gideon Sitelu Konchellah V Julius Lekakeny Ole Sunkuli & 2 Others; Raila Amolo Odinga & Another V Independent Election & Boundaries Commission Petition No. 1 of 2017** I find that the preliminary objection indeed demonstrated the Defendant’s objection to the instant application and in the interests of justice, I will exercise my discretion and allow the Defendant’s replying affidavit to have been deemed to be duly filed. On the issue of striking out the Defence and Counterclaim, from a perusal of the same, I note the Defendant has disputed the Plaintiff’s proprietary rights over the suit land; made reference to ELC 579 of 2017 where the Plaintiffs therein have sought for a vesting order and provided a history of the suit land wherein he claims 1.5 acres out of land parcel number Kajiado/ Kitengela/33569 which he purchased from Moses Kirruti Lempaso and Grace Waithera Kirruti. He claims to have developed the suit land. From the averments in the Defence and prayers sought in the Counterclaim, I opine that the said Defence indeed raises triable issues which cannot be determined at this juncture. I opine that this matter should proceed to full trial to enable the court make a determination of the same on its merits.

In relying on the two Court of Appeal decisions cited above as well as the facts as presented, I will decline to strike out the Defence and Counterclaim as sought by the Plaintiff.

In the circumstances, I will disallow the Plaintiff’s application dated 8th May, 2019 and direct that all the parties do comply with Order 11 and set the suit down for hearing on its merits.

Costs will be in the cause.

Dated signed and delivered via email this 19th day of May, 2020.

CHRISTINE OCHIENG

JUDGE